

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	CC Docket No. 02-6
)	
Request for Review of Decisions)	
of the Universal Service Administrator)	
)	
By Encinitas Union School District)	File Nos. SLD 560067, 602626, 653949,
)	704220 and 800921
)	
)	FRNs 1546899, 1663285, 1792255, 1966774
)	and 2177898

To: Chief, Wireline Competition Bureau

CONSOLIDATED REQUEST FOR REVIEW

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Table of Contents

I.	INTRODUCTION	2
II.	STATEMENT OF THE DISTRICT'S INTERESTS IN THE REQUEST	3
III.	KEY BACKGROUND FACTS	3
A.	The District.....	3
B.	FCC FY 2007 Form 470 And Request For Proposals	4
C.	The District's FY 2007 Competitive Bidding Process.....	6
D.	The FY 2007 FCC Form 471	6
E.	The FYs 2008-2011 FCC Form 471s	7
F.	The USAC Audit And COMADs	7
IV.	STANDARD OF REVIEW	9
V.	ARGUMENT	10
A.	The COMADs Are Vague As To Violations On Which They Are Based.....	10
B.	To The Extent That The COMADs Rely On Section 20118.2 That Reliance Is Misplaced	12
C.	The District Complied With FCC Competitive Bidding Requirements	14
D.	A Waiver Of Any Technical Violations Is Fully Justified.....	16
VI.	CONCLUSION AND REQUEST FOR RELIEF.....	18

SUMMARY

This Consolidated Request For Review ("Request") relates to five (5) separate Notification of Commitment Adjustment Letters ("COMADs") served on the Encinitas Union School District ("EUSD" or "District") to recover Funding Year ("FY") 2007 - 2011 support provided under the Schools and Libraries Support Mechanism ("E-Rate Program" or "Program"). Specifically, each of the COMADs at issue here is based on alleged violations in the competitive bidding process for FY 2007 support for a five-year contract with Pacific Bell Telephone Company for eligible Priority 1 telecommunications services, specifically fiber optic wide area network services. The COMADs for subsequent FYs (i.e., FYs 2008-2011) are based on the premise that the alleged violations in the original FY 2007 competitive bidding process infected all subsequent requests for Program support citing to the FCC Form 470 (#801210000602237) pursuant to which the FY 2007 competitive bidding process was conducted and the multi-year contract was awarded.

The District respectfully submits that it conducted a fair and open competitive bidding process for FY 2007 in accordance with the Federal Communications Commission's ("FCC") E-Rate Program rules. The COMADs do not specify what provisions of "Californias [sic] procurement laws" were violated. To the extent that assertion is based on Section 20118.2 of the California Procurement Code, the claim is misplaced. The District's original detailed Request For Proposals ("RFP") incorporated the E-Rate Program rule requirements and thus all potential bidders were on notice of the evaluation requirements incorporated in those rules (e.g., price being required to be the highest weighted factor). The District selected the lowest priced bidder, a service provider with extensive experience participating in the E-Rate Program. All bidders were on a level playing field. There is no evidence that there was any inconsistency or confusion about bid evaluation criteria that would have provided one bidder an advantage and would justify requiring recovery of the support provided for these telecommunications services for FYs 2007-2011.

Even if the Commission were to conclude that there had been technical violations of its E-Rate Program rules, the totality of the circumstances in this case justifies a waiver of any shortfalls in the District's FY 2007 competitive bidding process and rescission of the COMADs. Again, there is no evidence that any bidder was at a disadvantage. All potential bidders had access to the same information. There is no evidence of any waste, fraud or abuse or intent to evade the E-Rate Program rules. The requirement for recovery of these funds, which were properly expended in accordance with USAC's approval, would only cause a financial hardship for the District and under the circumstances would not serve the fundamental purposes of the E-Rate Program. Therefore, a limited waiver of the E-Rate Program rules is justified and for this additional reason the COMADs should be rescinded.

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By Encinitas Union School District)	File Nos. SLD 560067, 602626, 653949, 704220 and 800921
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)	FRNs 1546899, 1663285, 1792255, 1966774 and 2177898

To: Chief, Wireline Competition Bureau

CONSOLIDATED REQUEST FOR REVIEW

On behalf of Encinitas Union School District ("EUSD" or "District"), this is a consolidated request for review ("Request") of decisions of the Administrator of the Universal Service Administrative Company ("Administrator").¹ Specifically on March 11, 2013, USAC issued a series of Notice of Commitment Adjustment Letters ("COMADs") seeking to recover certain Schools and Libraries Support Mechanism ("E-Rate Program" or "Program") support provided to the District for Funding Years ("FY") 2007 – 2011. The District hereby seeks review of these USAC decisions.²

¹ The Administrator, the Universal Service Administrative Company and the Schools and Libraries Division ("SLD") thereof will hereinafter collectively be referred to as "USAC."

² The Request is timely filed. Section 54.720(b) of the Commission's E-Rate Program rules requires such a filing be made "within sixty (60) days of issuance" of a decision by USAC. The COMADs are dated March 11, 2013, and sixty (60) days thereafter is May 10, 2013.

Each of the COMADs at issue here is based on alleged violations in the competitive bidding process for FY 2007 support for a five-year contract with Pacific Bell Telephone Company for eligible Priority 1 telecommunications services, specifically fiber optic wide area network services. The COMADs for subsequent FYs (i.e., FYs 2008–2011) are based on the premise that the alleged violations in the original FY 2007 competitive bidding process infected all subsequent requests for Program support citing the FCC Form 470 (#801210000602237) pursuant to which the FY 2007 competitive bidding process was conducted and the multi-year contract was awarded. Thus, in each case, the substance of the Funding Commitment Adjustment Explanation is identical.³

I. INTRODUCTION

The COMADs are unwarranted and should be rescinded. The District respectfully submits that for FY 2007 it conducted a fair and open competitive bidding process as required by the E-Rate Program rules. The COMADs do not identify which provisions of “Californias [sic] procurement laws” were violated, but to the extent that assertion is based on Section 20118.2 of the California Procurement Code, the claim is misplaced. The detailed Request For Proposals (“RFP”) incorporated the E-Rate Program rule requirements and thus all potential bidders were on notice of the evaluation requirements incorporated in those rules (e.g., price being the primary factor). There was no inconsistency or confusion about the evaluation criteria that would justify requiring recovery of the FYs 2007–2011 support. E-Rate Program rules specify that price must be given the most weight during the competitive bidding process. The District selected the lowest priced bidder, a

³ Exhibit 1 is a chart showing the relevant data with respect to each of the five (5) COMADs involved, including the funding support approved and disbursed and now sought to be recovered and rescinded. Copies of the COMADs follow the chart at Exhibit 1. The District notes that it is simultaneously filing a separate Consolidated Request For Review relating to seven (7) COMADs covering FYs 2008 – 2011 based on similar justifications, but a separate four (4) year contract for voice, data and long distance services. The District respectfully requests that these two Consolidated Requests be considered together. There is overlap in some of the COMADs because USAC has included FRNs involving both contracts under the same COMAD.

service provider with extensive experience of E-Rate Program participation. All bidders were on a level playing field. Moreover, the then applicable Program rules governing the selection process did not specify a specific format for bid evaluation sheets or the specific information that must be captured on any bid evaluation matrix.

Finally, even if the Commission were to conclude that the District's competitive bidding process may not have been fully consistent with the E-Rate Program rules, a waiver of any such inconsistency is fully justified under the circumstances, would not be inconsistent with the goals of the Program and is in the public interest and would serve the goals of the Program.

II. STATEMENT OF THE DISTRICT'S INTERESTS IN THE REQUEST

The District has standing to file this Request because Section 54.719(c) of the Commission's rules provides that "[a]ny person aggrieved by an action taken by a division of the Administrator ... may seek review from the Federal Communications Commission."⁴ In this case, the District is directly aggrieved by the COMADs and USAC's effort to recover previously-approved Program funds properly expended in accordance with that approval.

III. KEY BACKGROUND FACTS

A. The District

The District serves approximately 5,450 students in grades Kindergarten through 6th grade in the City of Encinitas and the La Costa area of Carlsbad in North San Diego County, California. The District is consistently highly ranked in the state and county for its student test scores and academic and supplemental programs. The District contains nine (9) schools, which are recognized as California Distinguished Schools.⁵ La Costa Heights, Mission Estancia, Olivenhain Pioneer and Park Dale Lane Schools have been recognized as National Blue Ribbon Schools.

⁴ 47 C.F.R. § 54.719(c).

⁵ The Distinguished Schools program recognizes approximately 225 elementary schools every other year that

The District serves a diverse and varied community. The student population is approximately 19% Hispanic, 5% Asian, 69% Caucasian, and 7% other minorities. The District's teachers and students work collaboratively with parents and community members in the areas of Science, Technology, Engineering, Mathematics, and the Arts.

The District has participated in the E-Rate Program since 1998. Throughout that participation, E-Rate Program matters have been handled on a part-time basis by District personnel and, more recently, with the assistance of an outside E-Rate Program consultant. In the past few years, the District has had a complete turnover of its staff that handles E-Rate Program matters. The District's E-Rate Program consultant was also replaced during this same time period covered by the COMADs.

The District relies heavily on E-Rate Program funding to help reduce the cost of its telecommunications services. The District's funding from the State of California and the local community has decreased by more than \$9 million over the last four (4) years. There are no funds available or budgeted to make repayment if this Request is denied. Rather, the District will be forced to reallocate funding that would otherwise be used to support student services to the repayment of E-Rate Program funds that were properly expended in accordance with USAC approval.

B. FCC FY 2007 Form 470 And Request For Proposals

The District's FCC Form 470 requesting funding for telecommunications services was posted on December 7, 2006 (FCC Form 470 #801210000602237).⁶ In the Form 470, the District requested bids for a multi-year contract to provide Fiber Optic Wide Area Network Service (F-WAN) in order to connect the District's main office, 9 school locations and the San Diego County Office of Education.

are doing an exemplary job of educating students.

⁶ The FCC Form 470, Form 470 Application No. 801210000602237, is at Exhibit 2.

The District also indicated therein that it would release an RFP. The District's nearly 50 page RFP was available upon request and was provided to at least four potential bidders: AT&T, Time Warner, The Network Center, and Sunesys.⁷ On December 12 and 19, 2006, the District published a notice in the local newspapers announcing the RFP, who to contact for additional information, and that all bids had to be received by January 11, 2007. An Addendum to the RFP was made available on December 16, 2006, and a copy was sent to AT&T, Time Warner, The Network Center, and Sunesys on December 18, 2006.⁸ The Addendum provided additional details on certain requirements.

Pursuant to the RFP, all responses were due no later than Thursday, January 11, 2007 in order to be considered. Section B of the RFP ("Basic Requirements/Conditions") required vendors to "provide detailed and summary costs per circuit/link for both initial and [future] incremental bandwidth...."⁹ Appendix B in Section C of the RFP ("Additional Requirements/Conditions") contained a table titled "Initial Bandwidth Requirements/Schedule of Costs" and the notation "Cost information must be submitted in the above format."¹⁰ The District required vendors to submit cost information in the same format so it would be able to compare all bids received on the basis of price. Section D of the RFP ("Miscellaneous General Conditions") contained the following requirement:

5. FEDERAL OR STATE REGULATIONS. The *Bidder's* proposal and any contract entered into are subject to all applicable statutes of the *United States* or of the *State* and all applicable regulations and orders of the *Federal* or *State* governments now in effect or which shall be in effect during the period of such contract. (emphasis in original).

⁷ The RFP is at Exhibit 3.

⁸ The Addendum to RFP is also at Exhibit 3.

⁹ RFP at 2.

¹⁰ RFP at 3.

C. The District's FY 2007 Competitive Bidding Process

The District received two bids, from AT&T and Sunesys, respectively, and a no-bid notice from Time Warner. On January 20, 2007, the District's E-Rate Program consultant provided the District with a review and analysis of the bids. The AT&T and Sunesys bids fully responded to the District's requirements detailed in the RFP. AT&T's bid price was half of the Sunesys bid and, therefore, fully consistent with the E-Rate Program rules then in effect, the District selected AT&T's bid since the E-Rate Program rules required price to be the most important evaluation factor.¹¹ The selection of AT&T's bid was also in compliance with District regulations because the bid was "the lowest responsible bidder who shall give such security as the Board of Trustees requires...."¹² The District and AT&T (through its affiliate Pacific Bell Telephone Company) entered into a five-year Master Agreement, dated February 5, 2007, and a subsequent undated Addendum (the "AT&T Contract").

D. The FY 2007 FCC Form 471

On February 6, 2007, the District submitted an FCC Form 471 (#560067), seeking FY 2007 E-Rate Program support for the fiber optic wide area network telecommunications services pursuant to the AT&T Contract.¹³ USAC issued a Funding Commitment Decision Letter on July 31, 2007 providing \$96,267.44 in funding support under FRN 1546899 for FY 2007.¹⁴ Of that amount, \$79,295.86 was subsequently disbursed and expended for the purposes for which it was approved.¹⁵

¹¹ 47 C.F.R. § 54.504(b)(vii) (2006) ("All bids submitted will be carefully considered and the bid selected will be for the most cost-effective service or equipment offering, with price being the primary factor, and will be the most cost-effective means of meeting educational needs and technology plan goals."). The "Fiber WAN RFP Response Summary" relating to the bids is at Exhibit 4, along with the bids received.

¹² See the District's then applicable procurement guidelines contained in AR 331 Business and Noninstructional Operations, which are at Exhibit 5.

¹³ The FCC Form 471 for FY 2007 is at Exhibit 6.

¹⁴ See Exhibit 1.

¹⁵ *Id.*

E. The FYs 2008-2011 FCC Form 471s

In each of the subsequent FYs during which the District planned to continue to take service under the contract first entered pursuant to the FY 2007 competitive bidding process (i.e., FYs 2008-2011), the District was not required to “re-compete” for the service by filing a FCC Form 470.¹⁶ It simply filed an FCC Form 471 which included the request and cited the original FY 2007 Form 470. USAC fully funded the amounts requested by the District in each of those FYs.¹⁷

F. The USAC Audit And COMADs

In a letter dated May 15, 2012, USAC’s Internal Audit Division notified the District that it would be conducting an audit of FY 2010 E-Rate Program support to the District for telecommunications services. The District fully cooperated with USAC’s auditors over a six-month period and provided all of the requested documents to the best of its abilities.

On or about November 23, 2012, USAC issued a final audit report which included a finding relating to the competitive bidding process originally awarding the multi-year fiber optic wide area network service contract to AT&T for FY 2007. That finding, which became the basis for the COMADs, concluded in relevant part:

**Finding #1
Failure to Comply with Competitive Bidding Requirements Criteria**

1. “The request for proposals shall identify all significant evaluation factors, including price, and their relative importance.” California Pub. Cont. Code § 20118.2 (d)(4) (2006-2007).¹⁸

¹⁶ The E-Rate Program rules and precedent provide that if the applicant properly competes a permitted multi-year contract for eligible services, then it need not post a new Form 470 and recompile provision of the same services in subsequent years under the contract. The applicant submits a new FCC Form 471, citing back to the Form 470 under which the multi-year contract originally was competed. That is of course what happened in this case. *See Request for Review of Decisions of the Universal Service Administrator by Consorcio de Escuelas y Bibliotecas de Puerto Rico, Order*, 28 FCC Rcd 64, 69 ¶ 11, n.46 (WCB 2013) (“*Consorcio Order*”).

¹⁷ The relevant FCC Forms 471 for FYs 2008-2011 are at Exhibit 7. The approved funding for each of those FYs and the amounts disbursed under the relevant FRNs are reflected on Exhibit 1.

¹⁸ California Pub. Cont. Code § 20118.2, which is at Exhibit 8, is hereinafter referred to simply as “Section 20118.2.”

2. "Except as provided in § 54.511(c), an eligible, school, library, or consortium that includes an eligible school or library shall seek competitive bids, pursuant to the requirements established in this subpart, for all services eligible for support under §§ 54.502 and 54.503. These competitive bid requirements apply in addition to state and local competitive bid requirements and are not intended to preempt such state or local requirements." 47 CFR § 54.504(a) (2007-2008).

3. "[The] FCC Form 471 shall be signed by the person authorized to order telecommunications and other supported services for the eligible school, library, or consortium and shall include that person's certification under oath that: ...The entities listed on the FCC Form 471 application have complied with all applicable state and local laws regarding procurement of services for which support is being sought." 47 C.F.R. § 54.504(c)(1)(vi) (2007-2008).

Condition

IAD examined documentation to determine whether the competitive bidding process that the Beneficiary used to select service providers complied with state and local competitive bid requirements, as well as FCC requirements, as required by the Rules. California's Public Contract Code requires the Beneficiary to identify the significant bid evaluation factors and their relative importance in the Request for Proposals (RFPs) issued under Section 20118.2 of California's Public Contract Code and the Rules require the Beneficiary to comply with state and local competitive bid requirements (criteria 1 to 3). Although the Beneficiary's FY 2007 RFP, including its "Addendum I" ... included the significant evaluation factors in the RFP[], the RFP[] did not identify the importance of each factor in evaluating the potential bids, as required by California's procurement laws (criterion 1)....

As a result of the Beneficiary's omission of the importance of each bid evaluation factor for evaluating the potential bids from the FY 2007 RFP including its "Addendum I," ..., IAD concluded that the Beneficiary was not compliant with the Rules....¹⁹

Accordingly, on March 11, 2013, USAC issued the COMADs, which collectively seek recovery of \$444,449.41 with respect to Program support under the captioned FCC Form 471 applications/FRNs and rescission of an additional \$22,722.64.²⁰ The Funding Commitment Adjustment Explanation ("Explanation") with respect to those FCC Form 471 applications and FRNs states, in relevant part, as follows:

After a thorough investigation, it has been determined that this funding commitment must be rescinded in full. On the FY 2007 FCC Form 470, you certified that you reviewed and complied with all FCC, state and local procurement/competitive bidding requirements. During an audit, it was determined that you failed to comply with all FCC, state and local procurement/competitive bidding requirements.

¹⁹ The relevant finding from the audit report is at Exhibit 9. The Commission will note that the finding, which has been excerpted here to reflect FY 2007, refers to both the FY 2007 and FY 2008 competitive bidding processes. Thus, the COMADs based on the finding also refer to both FYs.

²⁰ See Exhibit 1.

This determination was based on the auditor's finding that bid evaluation sheets provided by the applicant, did not identify the significant bid evaluation factors and their relative importance in the Request for Proposal (RFP) in funding year... 2007.... The applicant did not identify the importance of each factor in evaluating potential bids as required by California's [sic] procurement laws.... FCC rules require that the applicant submit a bona fide request for services by conducting internal assessments of the components necessary to use effectively the discounted services ordered, and by submitting a complete description of services requested so that it may be posted for competing providers to evaluate and certify to certain criteria under penalty of perjury. Since you failed to comply with local and state procurement laws, you violated the competitive bidding process. Accordingly, the commitment has been rescinded in full and USAC will seek recovery of any improperly disbursed funds from the applicant.²¹

IV. STANDARD OF REVIEW

By rule, the Commission's review of USAC decisions is *de novo*, without being bound by any of USAC's findings or conclusions.²²

Further, USAC's authority to administer the E-Rate Program is limited. USAC is authorized to implement and apply the Commission's rules and the Commission's interpretations of those rules as found in Commission decisions and orders.²³

USAC is not empowered to make policy, interpret any unclear provisions of the governing statute or the rules promulgated by the Commission,²⁴ or create the equivalent of new guidelines.²⁵ USAC is responsible for "administering the universal support mechanisms in an efficient, effective,

²¹ The Explanations, on page 4 of each COMAD, are substantively the same. Again, we have excerpted the relevant language that applies to FY 2007.

²² 47 C.F.R. § 54.723.

²³ 47 C.F.R. § 54.702(c).

²⁴ *Id.*

²⁵ *Changes to the Board of Directors of the Nat'l Exchange Carrier Ass'n, Inc., Third Report and Order*, 13 FCC Rcd 25058, 25066-67 ¶¶ 15-16 (1998) ("*Third Report and Order*").

and competitively neutral manner.”²⁶ In connection with efforts to recover previously approved E-Rate support, USAC has the burden of acting in a timely manner to recover and demonstrate that there has been a statutory or substantive rule violation.²⁷

Finally, USAC is charged with measuring the conduct at issue against the FCC rules and policies in effect at the time that the conduct took place, not using subsequent rules and applying them retroactively.²⁸

In each Subsection of the Argument below, the District addresses the substantive bases on which USAC rests the COMADs and collectively demonstrates why the COMADs are unjustified and must be rescinded.

V. ARGUMENT

A. The COMADs Are Vague As To Violations On Which They Are Based

It is reasonable to expect that a COMAD justification include sufficient details so that a beneficiary is able to understand how USAC alleges the applicant violated the applicable E-Rate Program rules and frame an appeal. The District respectfully submits that the COMADs issued to the District, which contain the assertions to which it must respond, fail to meet that standard.

For example, each COMAD states:

FCC rules require that the applicant submits a bona fide request for services by conducting internal assessments of the components necessary to use effectively the discounted services ordered, and by submitting a complete description of services requested so that it may be posted for competing providers to evaluate and certify to certain criteria under penalty of perjury.²⁹

²⁶ 47 C.F.R. § 54.701(a).

²⁷ See *Schools and Libraries Universal Service Support Mechanism, Fifth Report and Order*, 19 FCC Rcd 15808, 15813-14, 15818-19 ¶¶ 15, 32 (2004) (“*Fifth Report and Order*”).

²⁸ See e.g., *Request for Review of a Decision of the Universal Service Administrator by Fort Worth Independent School District*, Order, 27 FCC Rcd 14995, 14996 ¶ 4, n.12 (WCB 2012).

²⁹ COMADs at 4.

Yet, there is absolutely no explanation of how the District allegedly violated this requirement. This is not adequate notice that provides the District with the opportunity to defend itself and does not justify the COMADs.

Further, the COMADs do not cite what “FCC, state and local procurement /competitive bidding requirements” the District allegedly violated. The COMADs state that the alleged violation is “based on the auditors finding that bid evaluation sheets provided by the applicant, did not identify the significant bid evaluation factors and their relative importance in the Request for Proposal (RFP) in funding year[] ... 2007....”³⁰ The COMADs cite no E-Rate Program rules that include such a requirement. Finally, the COMADs do not identify the “Californias [sic] procurement laws” which required this identification, although presumably it is Section 20118.2 cited by the audit finding. Still, the District should not be required to guess if that is the case.

In the *Virginia DOE Order*, the Commission acknowledged “[t]here appears to have been confusion on the part of Virginia DOE with regard to why USAC denied its funding request, and this may have impaired Virginia DOE’s efforts to appeal the decision.”³¹ The Commission granted the Virginia DOE’s petition for reconsideration and explained that “[t]he inconsistencies noted above indicate that a more detailed inquiry should have been conducted to determine what services were actually provided ... [and] we find that USAC does not yet have enough information to make that determination. ... We direct USAC to provide the Bureau with detailed findings as a result of its further investigation and analysis of how it reached its conclusions.”³²

The District is in a similar position. The COMADs lack the necessary specificity for the District to be able to fully understand all the alleged violations of E-Rate Program rules and leave

³⁰ *Id.*

³¹ *Petition for Reconsideration by Virginia State Department of Education, Richmond, VA, et al., Order on Reconsideration*, 22 FCC Rcd 7250, 7253 ¶ 7 (WCB 2007) (“*Virginia DOE Order*”).

³² *Id.*, ¶ 10.

the District to assume what “Californias [sic] procurement laws” were allegedly violated. The Commission should not uphold the USAC decisions without at a minimum directing it first to articulate the specific E-Rate Program rule or “Californias [sic] procurement laws” that were allegedly violated and USAC’s analysis in support of that conclusion.³³

B. To The Extent That The COMADs Rely On Section 20118.2 That Reliance Is Misplaced

In concluding that the District failed to comply with “Californias [sic] procurement laws,” the COMADs apparently rely on Section 20118.2 and more specifically Subsection (d)(4), which states that in a “competitive negotiation” under that Section “[t]he request for proposals shall identify all significant evaluation factors, including price, and their relative importance.”³⁴ The COMADs do not explain how or why that statute applies to the District’s acquisition of telecommunications services.³⁵ On further investigation, USAC has not established that this requirement of the statute even applies to the District’s FY 2007 acquisition of telecommunications services from AT&T.

Subsection (b) of Section 20118.2 states that “this section [i.e., Section 20118.2] applies *only* to a school district’s procurement of computers, software, telecommunications equipment, microwave equipment and other related electronic equipment and apparatus” (emphasis supplied). Yet the E-Rate Program support in question was for Priority 1 telecommunications services, particularly a fiber optic wide area network services. So, on its face, Section 20118.2 is inapplicable to the “products” acquired.

³³ See generally *Request for Review of a Decision of the Universal Service Administrator by Atlanta Public Schools, Order*, 27 FCC Rcd 13943, 13945 ¶ 6 (WCB 2012) (insufficient notice to applicant).

³⁴ Section 20118.2 is at Exhibit 8.

³⁵ Nor for that matter does the audit finding. The finding simply asserts that it applies. See Exhibit 9.

Subsection (d) of Section 20118.2, which includes the requirement that the auditors cited as the basis for their finding, is tied to Subsection (c). That Subsection states that “[n]otwithstanding Section 20118.1, a school district may, after a finding is made by the governing board that a particular procurement qualifies under Subdivision (b), authorize the procurement of the product through competitive negotiation as described in Subsection (d).” Again, as noted above, Subsection (b) does not apply to services. Moreover, Section 20118.1 applies to the acquisition of “electronic data-processing systems and supporting software.”³⁶ So, Subsection (c) permits competitive negotiation of those types of products where the school district governing board has made the finding required under the statute. Subsection (d) then defines “competitive negotiation” for purposes of Section 20118.2.

Again, the procurement at issue here is services, not equipment or apparatus. USAC does not cite or point to any “finding” made by the District that it was invoking Subsection (d) of Section 20118.2 in this instance. Moreover, the use of “competitive negotiation” to procure telecommunications services could arguably be a violation of California law since the statute does not apply to such acquisitions.

In light of the foregoing, the District respectfully submits that USAC has failed to establish any violation of Section 20118.2 that in turn justifies the COMADs. If there are other state or local law provisions on which USAC bases the COMADs, it has not identified them and the District has had no opportunity to respond. Therefore, the COMADs could not be based on such unidentified and unknown legal requirements. The District respectfully submits that there has been no demonstrated violation of “Californias [sic] procurement laws” that warrants the COMADs, which should be rescinded.

³⁶ Section 20118.1 is also at Exhibit 8.

C. The District Complied With FCC Competitive Bidding Requirements

The COMADs are also based on the general claim that the “bid evaluation sheets provided by the applicant, did not identify the significant bid evaluation factors and their relative importance in the Request for Proposal (RFP) in funding year[] ... 2007....”³⁷

The District respectfully submits that there is no E-Rate Program rule requirement that a bid evaluation sheet must reflect each evaluation factor to satisfy the requirement for a fair and open competitive bidding process. USAC has not cited to any such rule. Here, the District was able to provide USAC with evidence that it conducted a competitive bidding process and it used price as the primary factor in reviewing the bids it received and selected the lowest price bidder.³⁸ Under such circumstances the competitive bidding process should not be deemed defective and the COMADs should be rescinded.³⁹

Starting with its on-line training materials in 2007, USAC did include a sample bidding matrix and related discussion. Therein USAC stated “[t]he applicant must choose the most cost-effective offering with the price of eligible products and service being primary”⁴⁰ and suggested that applicants should “[c]reate [a] selection matrix and follow it.”⁴¹ The same training materials also

³⁷ COMADs at 4.

³⁸ The Commission has accepted an email communication evidencing evaluation of bids before the applicant selects a winning vendor. *See Request for Review of Decisions of the Universal Service Administrator by Central Islip Fee Union School District*, Order, 26 FCC Rcd 8630, 8635 ¶ 9 (WCB 2011).

³⁹ *Requests for Review of a Decision of the Universal Service Administrator by Baltimore City School District, Baltimore, MD, et al.*, Order, 26 FCC Rcd 11193, 11197 ¶ 8 (WCB 2011) (where applicants provided evidence that price was given highest weight during bidding evaluation process that process was deemed in compliance with E-Rate Program and state procurement requirements); *see Requests for Review of Decisions of the Universal Service Administrator by Allendale County School District, Cedar Mountain, North Carolina, et al.*, Order, 26 FCC Rcd 6109, 6114-15 ¶ 9 (WCB 2011) (selection of the least expensive offering consistent with policy goals underlying the competitive bidding rules, even where price not given highest weight)(“*Allendale Order*”).

⁴⁰ E-Rate 101: Overview of the Program, Sept.-Oct. 2007, <http://www.usac.org/about/tools/TrainingArchive/default.aspx?div=3>.

⁴¹ How Do I Run a Good Competitive Bidding Process?, Sept.-Oct. 2007, <http://www.usac.org/about/tools/TrainingArchive/default.aspx?div=3>.

state that “failure to provide competitive bidding support documentation” is a competitive bidding violation.⁴² The presentation lists vendor bid score sheets as an example of the kind of documentation that is part of the “competitive bidding support.”⁴³ However, USAC’s training materials can only be considered “informational” since USAC is not authorized to make policy, interpret any unclear provisions of the E-Rate Program rules, or create new guidelines.⁴⁴

The District concedes that the Commission has cited “documents describing the bid evaluation criteria and weighting, as well as the bid evaluation worksheets” as the type of documentation that must be retained under the E-Rate Program rules.⁴⁵ However, the District respectfully submits that the use or retention of such documentation is not the exclusive grounds on which a determination can be made that a fair and open competitive bidding process has taken place. Here the District submitted to USAC bid requests, bid proposals and an evaluation showing that price was given the greatest weight, a factor incorporated into the relevant RFP. Under such circumstances and in similar situations, the Commission has concluded that the competitive bidding process passed muster.⁴⁶

Again, the bottom line is whether it can be determined that any bids were in fact appropriately evaluated before contract entry and the posting of a Form 471. Here, the District was able to provide USAC with evidence that it conducted a fair and open competitive bidding process

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See 47 C.F.R. § 54.702(c); *Third Report and Order*, ¶¶ 15-16.

⁴⁵ See *Fifth Report and Order*, *supra*, ¶ 48.

⁴⁶ See *Allendale Order*, *supra*, ¶ 9 (under such circumstances, even absent evidence that price given the highest weight, the process found not to violate competitive bidding rules); see also *Requests for Review of Decisions of the Universal Service Administrator by Net 56, Inc.*, *Order*, 27 FCC Rcd 13606, 13618 ¶ 14 (WCB 2012).

in which all bidders were on a level competitive playing field and it used price as the highest weighted factor because it chose the lowest bidder.⁴⁷

D. A Waiver Of Any Technical Violations Is Fully Justified

The District respectfully submits that for all of the foregoing reasons the COMADs should be rescinded. There was no compromise of the E-Rate Program competitive bidding rules or California procurement laws in effect for FY 2007. The COMADs based on that conclusion covering the period FYs 2007-2011 are therefore unjustified and unsupported.

However, if the Commission is inclined to conclude that there was a technical violation of the applicable competitive bidding rules for FY 2007, a waiver of the requirement is wholly justified in the circumstances here.⁴⁸

The Commission's rules allow waiver of a Commission rule "for good cause shown."⁴⁹ The Commission has extended this waiver authority to waivers of USAC rules. For example, in the *Bishop Perry Order*, the Commission noted that it "has vested in USAC the responsibility of administering the application process for the schools and libraries universal service support mechanism."⁵⁰ Pursuant to that authority, USAC developed procedures relating to the application and appeals process.⁵¹ Thus, in *Bishop Perry*, the Commission applied the 47 C.F.R. § 1.3 waiver rule

⁴⁷ See *Requests for Review of a Decision of the Universal Service Administrator by Riverdale Unified School District*, Order, 26 FCC Rcd 11207, 11211 ¶ 9 (WCB 2011) (all bidders on level competitive playing field so finding of violation of competitive bidding rules not warranted); see also *Requests for Review of the Universal Service Administrator by Net 56, Inc.*, Order, 27 FCC Rcd 13606, 13618 ¶ 14 (WCB 2012).

⁴⁸ The Commission has stated where there is no compromise of the competitive bidding process by a technical violation a waiver is appropriate. *Request for Waiver and Review of Decisions of the Universal Service Administrator by Aberdeen School District*, Order, 27 FCC Rcd 1941, 1942 ¶ 1 (WCB 2012).

⁴⁹ 47 C.F.R. § 1.3.

⁵⁰ *Request for Review of Decisions of the Universal Service Administrator by Bishop Perry Middle School et al.*, Order, 21 FCC Rcd 5316, 5318 ¶ 4 (2006).

⁵¹ The *Bishop Perry Order* dealt with USAC application procedures known as "minimum processing standards." *Id.*

to allow a limited waiver of USAC procedures.⁵²

The Commission has established the following guidance for determining whether waiver is appropriate:

A rule may be waived where the particular facts make strict compliance inconsistent with the public interest. In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. In sum, waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule.⁵³

All bidders were on a level playing field here, despite any technical violation. Under such circumstances the Commission has seen fit to grant a waiver as in the public interest and supporting a more effective implementation of Commission policy on competitive bidding.⁵⁴ The outcome of the vendor selection process here was “consistent with the policy goals underlying the Commission’s competitive bidding rules” and therefore a waiver is appropriate.⁵⁵ There was no deterrence of any bidders.⁵⁶

⁵² *Id.*

⁵³ *Requests for Review of Decision of the Universal Service Administrator by Richmond County School District*, 21 FCC Rcd 6570, 6572 ¶ 5 (2006) (internal references omitted) (citing *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) and *WALT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *aff’d*, 459 F.2d 1203 (D.C. Cir. 1972)).

⁵⁴ *Requests for Review of a Decision of the Universal Service by Ramirez Common School District, Order*, 26 FCC Rcd 8430, 8432-33 ¶ 7 (WCB 2011). The Commission has stated that a waiver is appropriate where the record shows that for each of the funding requests at issue, the applicant selected the least expensive and most cost effective service offering. *See Requests for Review of Decision of the Universal Service Administrator by Colorado Springs School District, Order*, 27 FCC Rcd 722, 723 ¶ 1 (WCB 2012).

⁵⁵ *Requests for Review of Decision of the Universal Service Administrator by Euclid City School District, Euclid, OH, et al., Order*, 27 FCC Rcd 14169, 14170 ¶ 2 (WCB 2012).

⁵⁶ *See Consorcio Order, supra*, ¶ 13.

There is absolutely no evidence here of any activity by the District intended to defraud or abuse the E-Rate Program.⁵⁷ Nor is there any evidence of any waste, fraud or abuse or misuse of funds.⁵⁸ All funds were used for the purposes for which they were provided.

Furthermore, the imposition of a requirement to reimburse the requested funds under these circumstances years after they were originally approved and expended would impose an undue financial hardship on the District.⁵⁹ There is no evidence that the District acted in other than good faith.⁶⁰ Requiring repayment would not further the purpose of preserving and advancing access to universal service support for schools and libraries.⁶¹ Under such circumstances, it would be inequitable to uphold the COMADs.⁶² A waiver is appropriate in these special circumstances.

VI. CONCLUSION AND REQUEST FOR RELIEF

The District respectfully submits that the COMADs are unwarranted and should be rescinded. It issued a detailed RFP and selected the lowest price bidder, consistent with the E Rate Program requirement to give the price factor the highest weight. Also, there was no violation of Section 20118.2 of the California Procurement Code or any other California procurement law.

⁵⁷ See *Request for Review of the Decision of the Universal Service Administrator by New Haven Free Public Library*, Order, 23 FCC Rcd 15446, 15449 ¶ 7 (WCB 2008); *Request for Review of the Decision of the Universal Service Administrator by the District of Columbia Public Schools*, Order, 23 FCC Rcd 15585, 15588 ¶ 5 (WCB 2008); *Request for Review of the Decision of the Universal Service Administrator by Tekoa Academy of Accelerated Studies*, Order, 23 FCC Rcd 15456, 15458-59 ¶ 6 (WCB 2008).

⁵⁸ See *Requests for Review of Decisions of the Universal Service Administrator by Broadus Independent School District et al.*, Order, 23 FCC Rcd 15547, 15551-52 ¶ 12 (WCB 2008).

⁵⁹ See *Request for Review of a Decision by the Universal Service Administrator by Radford City Schools*, Order, 23 FCC Rcd 15451, 15453, ¶ 4 (WCB 2008); *Request for Review of a Decision of the Universal Service Administrator by Grand Rapids Public Schools*, Order, 23 FCC Rcd 15413, 15416 ¶ 6 (WCB 2008).

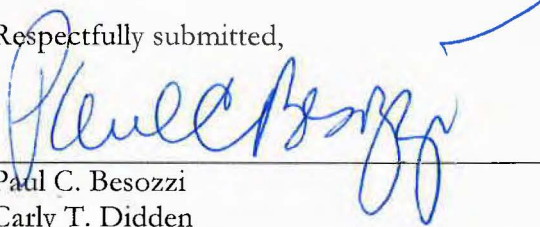
⁶⁰ See *Request for Waiver of the Decision by the Universal Service Administrator by Great Rivers Education Cooperative, Forrest City, Arkansas*, Order, 21 FCC Rcd 14115, 14119 ¶ 9 (WCB 2006).

⁶¹ See *Request for Review of a Decision by the Universal Service Administrator by Adams County School District 14*, Order, 22 FCC Rcd 6019, 6022 ¶ 8 (WCB 2007).

⁶² See *Request for Waiver and Review of a Decision of the Universal Service Administrator by Approach Learning and Assessment Center, Santa Ana, CA, Schools and Libraries Universal Service Support Mechanism*, Order, 23 FCC Rcd 15510, 15513 ¶ 8 (WCB 2008).

USAC has failed to establish any violations of the E-Rate Program rules in effect at the time of this procurement relating to evaluation factors. The District conducted a fair and open competitive bidding process. Further, in the event that the Commission concludes that there have been technical violations, a limited waiver of the E-Rate Program rules is justified under these circumstances. There is no evidence of waste, fraud, abuse, or failure to comply with the core program requirements. Unintended errors where the District made a good faith effort to comply with FCC rules and California procurement law should be considered procedural in nature, not a justification for the COMADs. For all of the foregoing reasons, the District respectfully submits that the FCC should direct that the COMADs be rescinded.

Respectfully submitted,



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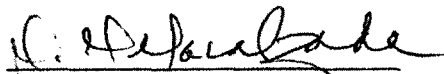
Counsel to Encinitas Union School District

Dated: May 10, 2013

DECLARATION

I, David D. Delacalzada, am the Director, Information Technology for Encinitas Unified School District ("District"). I have served in this position since December 8, 2009. As such I am responsible for the general oversight over the District's participation in the Schools and Libraries Support Mechanism ("E-Rate Program"). I participated in the USAC Internal Audit Division audit of the District in 2012 and I am familiar with the issues raised in the context of that audit and the subsequent March 11, 2013 Notification of Commitment Adjustment Letters.

I have reviewed the foregoing Consolidated Request For Review ("Request"), which was prepared at my request and under my supervision and control. I declare under penalty of perjury that the factual statements and representations concerning the District and the conduct of the competitive bidding process for FY 2007 set forth in the Request are true and correct to the best of my knowledge and belief.



David D. Delacalzada

Dated: May 10, 2013

CERTIFICATE OF SERVICE

I, Carly T. Didden, certify on this 10th day of May, 2013, a copy of the foregoing "Consolidated Request For Review" has been served via electronic mail or first class mail, postage pre-paid, to the following:

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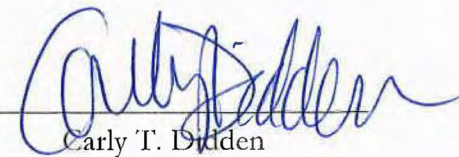
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